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May 4, 2004

Via Fax (202-493-2251) and Mail

United States Coast Guard,
Department of Homeland Security
Maritime Administration,
United States Department of Transportation
Docket Management Facility (USCG-2003-14472; MARAD 2003-15171)
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USCG - 2003 - 14472 - 34

MARAD - 2003 - 15171 - 33

**Re: Comments to Joint Notice of Proposed Rule Making – Vessel Documentation:
Lease Financing for Vessels Engaged in the Coastwise Trade, Second
Rulemaking Department of Homeland Security Docket No. MARAD 2003-
15171, Department Of Transportation Docket No. USCG 2003-14472**

Ladies and Gentlemen:

Holland & Knight LLP, on behalf of its clients Adsteam Marine Limited ("Adsteam") and Adsteam USA, Inc. ("Adsteam USA"), submits these comments in opposition to the referenced proposed joint notice of rule making (the "Proposed Rule") published by the United States Coast Guard, Department of Homeland Security, and the Maritime Administration, the Department of Transportation, at 69 Fed. Reg. 5403 *et seq.* (February 4, 2004).

We appreciate the opportunity to submit comments to the Proposed Rule.

Adsteam USA is a member in Northland Fuel LLC ("Northland Fuel"). Northland Fuel is the parent company of a leasing company that owns and leases a fleet of approximately 35 vessels engaged in the coastwise trade. Those vessels have been lease financed and documented pursuant to the lease-finance provisions enacted into law by the Coast Guard Authorization Act of 1996 and codified at 46 U.S.C. § 12106(e) (the "Statute"). As a result, Adsteam and Adsteam USA have a substantial, direct, continuing interest in the outcome of the Proposed Rule.

Prior to April 8, 2004, Northland Fuel was part of Northland Holdings, Inc. ("Northland Holdings"), in which Adsteam made an investment of approximately \$56 million and Adsteam USA was a shareholder since May 2000. Northland Fuel is principally engaged

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in the fuel distribution business in Alaska both on the Alaska road system and along Alaska's rivers and its coast.

For the reasons below stated, and as set forth in detail in prior comments submitted to the Coast Guard, we respectfully request that both the Coast Guard and MarAd reconsider their rulemaking on the basis of the plain language of the Statute enacted, refrain from adopting provisions in a Final Rule that were never published for public comment, and refrain from adopting the proposed restrictions on time charters of lease financed vessels and revising the current MarAd general approval of time charters.

We respectfully refer to comments we submitted on behalf of Adsteam and Adsteam USA dated August 31, 2001, January 28, 2002, and October 8, 2002 (Docket No. USCG 2001-8825), and comments submitted by Northland Holdings on September 4, 2001, January 28, 2002 and October 8, 2002 in Docket No. USCG 2001-8825, and on October 3, 2002 in Docket No. MARAD 2002-12842, which together with the comments presently being filed by Northland Fuel, we wholly endorse.

The Final Rule published February 4, 2004 has impermissibly departed from the clear language of the Statute, which had been enacted into law in 1996, but for which the Coast Guard until this year had published no regulations. The Final Rule and the effect of the Proposed Rule, if adopted unchanged, is to contravene the Coast Guard's own position in administering the Statute since its enactment in 1996, and the explicit assurances of statutory compliance given by the Coast Guard and MarAd on which Adsteam and others have relied.

Wrongfully and without any justification, the effect of the Final Rule and the Proposed Rule, if adopted unchanged, is to erode public confidence in the reliability of official governmental actions and approvals and in the very process of rule making itself by violating United States law, including the United States Constitution and international law, and by unjustifiably inflicting economic injury and depriving Adsteam and others similarly situated of property without due process of law or provision for just compensation. The foreign relations of the United States will be damaged as well.

We believe the Final Rule, coupled with the Proposed Rule, if adopted unchanged, will result in significant damage to Adsteam and others similarly situated.

The "grandfather" provisions should be revised to encompass the companies that relied upon them and should not be limited to vessels. By limiting the "grandfather" provisions to vessels only, the Final Rule has the effect of strangling business operations by forbidding companies from acquiring new vessels, or even replacing existing vessels that have suffered a casualty or need to be retired by reason of age or change in service, or even the Coast Guard's own regulatory requirements.

Surely no sensible policy of the United States is served by thus prohibiting the acquisition of vessels that are otherwise eligible for operation in the coastwise trade of the United States, including through the placement of orders for newbuilding vessels in the United States. True "grandfathering" should permit continued future use of Section 12106(e)

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as originally approved so that company operations may expand in a normal commercial manner both through organic growth and by acquisition.

The three-year "grandfather" provision commencing from February 4, 2004 as Coast Guard proposes, prohibits any sort of orderly process in restructuring. It bears no reasonable relation to the useful life of vessels or – moreover – to the reasonable expectations of companies that entered into lease finance transactions in reliance on governmental approvals. Such "grandfather" provisions are irrational and arbitrary and result only in giving an unfair advantage to competitors of effected companies that, to their detriment it seems, have relied upon the lease finance law.

The Final Rule contains provisions that were in large part never the subject of public comment. Accordingly, the process is fundamentally unfair and does not comport with the requirements of the Administrative Procedures Act.

We respectfully request that MarAd not change its current general approval of time charters, and that neither Coast Guard time charter alternative set forth in the Proposed Rule be adopted. A prohibition of time charters of vessels documented under Section 12106(e) is especially egregious and inappropriate in the case of Northland Fuel, since the time charters in use by its fleet were presented to, and reviewed, by both MarAd and Coast Guard. Having approved the charters in May of 2002, it would be both irrational, punitive and fundamentally unfair now for these same agencies to in effect nullify that approval and force a restructuring of the transaction.

There is no sensible policy of the United States that would be served by adopting such *ex post facto* nullification of prior agency approvals, nor is there anything in the legislative history of the Statute that supports such action. What constitutes a "time charter" has a well-established meaning at law (see Reed v. United States, 78 U.S. 591, 600-01 (1870); Kerr-McGee Corp. v. Ma-Ju Marine Services, Inc., 830 F.2d 1332, 1340 (5th Cir. 1987) (citing G. Gilmore & C. Black, *The Law of Admiralty* § 4-1 (1975); see also, Fitzgerald v. A.L. Burbank & Co., Ltd., 451 F.2d 670, 676 (2d. Cir., 1971)) and the proposed Coast Guard and MarAd actions are irrational, arbitrary and at variance with existing law.

Finally, the suggestion that applications to document vessels under the Statute be made available for public comment is nowhere supported in the Statute nor its legislative history. Moreover, it is poor policy, calculated to make commercial transactions more cumbersome and to give unfair commercial advantage to companies whose coastwise trade vessels are not documented under Section 12106(e). The stated purpose of the Statute is to invite participation by foreign capital sources in U.S. domestic shipping, provided they do not operate the vessels. Congress was satisfied in Section 12106(e) that this condition be met by requiring that the vessel be under long-term bareboat charter to U.S. coastwise citizen operator. Neither the Coast Guard nor MarAd is at liberty to depart from the prescription of Congress.

The United States Supreme Court has long ruled that a literal ruling and application of statutes is required. The Court has repeatedly admonished that the law " . . . means precisely

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what it says . . .". Kungys v. United States, 485 U.S. 759, 780 (1988). There is " . . . no reason for straining to avoid [the] natural meaning . . . " of the Statute, id. at 781, as the Proposed Rule requires and therefore the Proposed Rule should be rejected, no less because of the "draconian results" it would produce. Id. at 780.

The Proposed Rule and the Final Rule center about issues that are complex and lie at the foundation of existing and prospective transactions based on the Statute. The Final Rule, unfortunately, reflects the infirmities of *ad hoc* rulemaking, adopting provisions that were never properly vetted in public, for which there was no adequate opportunity for reflection and comment. No regulations under the Proposed Rule should be adopted without the Coast Guard and MarAd first allowing due public consideration of the precise text of all regulations affected, and an adequate public comment period. Without publishing the precise text of all proposed regulations and genuinely allowing for public comment, the infirmities of unintended consequences and punitive effects that have afflicted the rulemaking relating to the Statute thus far will continue, and Congress' purpose will continue to be thwarted.

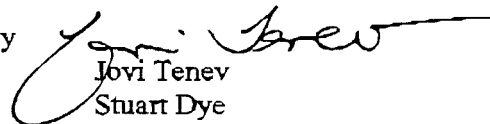
It is fundamentally unfair, punitive and a very poor governmental policy indeed, that commercial parties may in good faith enter into business arrangements on the basis of Congressional enactments, regulatory review and approvals, and then some years later find that those business arrangements must be undone and investments divested due to regulatory action. Coast Guard and MarAd should eschew such policies and give effect to the plain meaning of the Statute.

We appreciate the opportunity to submit these comments.

Very truly yours,

HOLLAND & KNIGHT LLP

By



Jovi Tenev
Stuart Dye

cc: Office of Information and Regulatory Affairs
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Attention: Desk Officer, U.S. Coast Guard